Supreme Court, U.S.
FILED
FEB 15 2000
CLERK

No. 99-782

IN THE
Supreme Court of the United States

PUBLIC CITIZEN, *ET AL.*

Petitioners,

v.

JOHN CARLIN,
ARCHIVIST OF THE UNITED STATES, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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13pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE DECISION BELOW ERRONEOUSLY HELD THAT FEDERAL LAW GOVERNING PRESERVATION OF GOVERNMENT RECORDS IS INDIFFERENT TO THE FORMAT AND CONTENT OF THE RECORDS. 1

II. THE COURT OF APPEALS IMPROPERLY DEFERRED TO INTERPRETATIONS THAT WERE FIRST ARTICULATED BY LITIGATION COUNSEL AND ARE AT ODDS WITH THE AGENCY'S OWN STATEMENTS. 5

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 6

Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins., 463 U.S. 29 (1983) 9

Securities and Exchange Commission v. Chenery, 318 U.S. 80 (1942) 5

STATUTES

44 U.S.C. § 2901(14) 3

44 U.S.C. § 3303(1) 7

44 U.S.C. § 3303a 1, 3, 4, 5, 7

REGULATIONS AND AGENCY NOTICES

36 C.F.R. § 1222.50(b)(1) (1999) 2

63 Fed. Reg. 41,869 (1998) 7

63 Fed. Reg. 54,503 (1998) 6

I. THE DECISION BELOW ERRONEOUSLY HELD THAT FEDERAL LAW GOVERNING PRESERVATION OF GOVERNMENT RECORDS IS INDIFFERENT TO THE FORMAT AND CONTENT OF THE RECORDS.

Respondents' Opposition is based almost entirely on portraying GRS 20 as a effort to relieve desktop computers crowded with unneeded, disorganized files. In doing so, the Opposition mischaracterizes GRS 20 and the consequences of the court of appeals' construction of 44 U.S.C. § 3303a.

First, Respondents repeatedly assert that GRS 20 is directed at "live" individual desktop computers that will be overloaded unless files are deleted. Opp. at 5, 13-14. GRS 20, however, is not limited to "live" systems. It also mandates the destruction of files that are stored "off-line" on floppy and hard disks, tapes, or other media. *See* Pet. App. at 70a. GRS 20 also applies to all types of computers, whether they be stand-alone personal computers, mainframes, or networked systems. *See* Pet. App. 69a (GRS 20 applies to the categories of records set forth in the schedule "regardless of the type of computer used to create or store these records").

Moreover, GRS 20 is not limited to systems that are confronting "overload" or to situations in which retention of the electronic files is difficult. GRS 20 applies equally to all agencies and computers, regardless of their technical capabilities. Thus, even if an agency can readily maintain the records in their electronic format, has no shortage of storage space, or has copied the files to magnetic storage media (*e.g.* tapes or disks) — GRS 20 directs the agency to destroy its electronic files once it has created a paper or microfilm copy for recordkeeping purposes.

Second, Respondents contend that the critical issue in GRS 20 is not the format or content of records, but whether the records are maintained in centralized files. GRS 20 is justified, Respondents assert, because the Archivist determined that the value of electronic records is minimal if the records are stored "on separate computers in individual offices," Opp. at 13, that "cannot be indexed or searched efficiently," *id.* at 5, 10, and that "petitioners' analysis is based on the incorrect assumption that the electronic records subject to GRS 20 are stored on publicly-accessible, centralized computer systems." *Id.* at 12-13.

However, GRS 20 is not limited to files on "separate computers in individual offices." It authorizes the destruction of *all* word processing and electronic mail files, even if they are centralized and can easily be indexed, searched and disseminated.

Moreover, the Archivist has long had regulations which require that agencies maintain their records, including electronic files, in organized files that can be indexed. 36 C.F.R. § 1222.50(b)(1). The significance of GRS 20 is that it considers the format in which records are organized to be irrelevant to whether they may have sufficient legal, research or other value to warrant their preservation. Under GRS 20, even if electronic files are in, or can be placed in, organized, searchable files, the Archivist has directed that the electronic files must be destroyed if a paper or microform copy has been made "for recordkeeping purposes." Pet. App. 70a-71a.

To give a concrete illustration, this Court's decisions are created electronically as word processing files before being printed in the official reports. Under GRS 20, once the electronic files have been used to print the reports that serve as

the "official" record, these files do not have any value that might warrant preservation of the electronic format, and the files must be destroyed "when no longer needed for updating or revision." Pet. App. at 70a-71a. GRS 20 leaves no room for consideration of fact that the electronic version can be used to disseminate information and facilitate research in ways that are not possible with paper or microform. Moreover, GRS 20 treats a cabinet secretary's memorandum of decision in the same way as routine correspondence of administrative personnel. Although this Court's opinions are exempt from GRS 20, *see* 44 U.S.C. § 2901(14), virtually all of the other opinions, memoranda, reports and other documents created by the federal government using word processing are now subject to destruction under GRS 20 once copied to paper or microform.

This result is inconsistent with experience and the Archivist's own statements acknowledging that the unique characteristics of electronic records make them valuable even if a copy exists in another form. *See* Pet. at 7-8. Indeed, the National Archives' own decisions on records appraisal show that, in some instances, because of the unique characteristics of electronic records, *both* the electronic and paper versions of records may have sufficient value to warrant their preservation. *See* Pet. at 15. Because GRS 20 treats the format of records as irrelevant to their value, it erroneously mandates the destruction of some electronic records that have sufficient value to warrant their continued preservation even if a paper or microform copy exists.

Third, the Opposition also mischaracterizes the issue presented here by adopting the court of appeals' assumption that 44 U.S.C. § 3303a requires that the Archivist adopt an all-or-nothing rule, *i.e.*, the only alternative to GRS 20 is to require

all agencies to retain all electronic mail and word processing records in electronic form, regardless of the records' value. This assumption is mistaken and represents the critical flaw in the court of appeals' reasoning.[1]

As the district court recognized, the disposition of electronic mail and word processing records can be authorized through agency-specific schedules that distinguish those records that are valuable from those that should be destroyed. *See* Pet. App. at 51a-52a. Indeed, such agency-specific schedules are the predominant means of determining whether government records should be destroyed or preserved because general schedules like GRS 20 are only used for about one-third of the volume of government records. *Id.* at 26a. Petitioners recognize that destruction of electronic records "certainly will be necessary and practical," but object to GRS 20 because it authorizes government-wide destruction of such records "without distinguishing valuable electronic records from useless ones." Pet. App. 31a. The decision below presents an important question that this Court should resolve because it takes the extraordinary position that 44 U.S.C. § 3303a allows the Archivist to decide that "an electronic mail message written by the Secretary of State regarding the President's decision to declare war on another country has the same value as GSA word processing file regarding procurement

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[1] *See* Opp. at 14-15 n. 6 ("petitioners' approach would mandate that agencies either adopt electronic recordkeeping or maintain records on 'live' systems indefinitely and risk potential system failure as a result."); Pet. App. at 17a (asserting that rejecting GRS 20 would "require all agencies that create electronic mail or word processing records either to establish electronic recordkeeping systems immediately or retain their electronic records until such time as they have electronic recordkeeping systems").

of desks, simply because both records were created by" word processing or electronic mail technology. Pet. App. at 42a.

Finally, Respondents close their Opposition by asserting that this Court should deny review because "the Archivist has indicated . . . that he is considering changes to GRS 20 and agency recordkeeping requirements," that would represent "a more permanent resolution of those matters." Opp. at 24-25. However, GRS 20 is a final agency rule, and the Archivist has no schedule for repealing it. Since 1995, this rule has authorized, and continues to mandate, the "permanent" and irrevocable deletion of the only electronic version of countless records in virtually every establishment of the federal government. Moreover, the court of appeals' construction of 44 U.S.C. § 3303a(d) opens the door to further use of general schedules to routinely authorize the destruction of the electronic versions of Internet documents, image files, databases and other records that are increasingly being created on government computers.

II. THE COURT OF APPEALS IMPROPERLY DEFERRED TO INTERPRETATIONS THAT WERE FIRST ARTICULATED BY LITIGATION COUNSEL AND ARE AT ODDS WITH THE AGENCY'S OWN STATEMENTS.

This Court's decisions, beginning with *Securities and Exchange Comm'n v. Chenery*, 318 U.S. 80 (1942), warn that courts must not give deference to positions developed by litigation counsel during judicial review because doing so intrudes "upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.* at 88, 94-95. The case law discussed in the Petition shows that the District of Columbia Circuit has construed this Court's opinion in *Auer v.*

Robbins, 519 U.S. 452 (1997), to severely limit this principle and to require that courts give controlling deference to positions articulated for the first time by counsel defending a challenged agency action. *See* Pet. at 22-23.

In their Opposition, Respondents contend that the court of appeals' discussion of *Auer* here was "unnecessary to the judgment," and the decision below actually represents an unremarkable example of deference to an agency's construction of a statute and agency regulations. Opp. at 23. This characterization is erroneous. Rather, the court of appeals here accepted three separate interpretations as authoritative, even though (i) these interpretations were not articulated by the agency when the same issue was presented during the administrative proceedings, and (ii) they are inconsistent with the agency's out-of-court statements on these issues.

1. As the district court observed, "every general records schedule promulgated to date, except GRS 20, covers administrative housekeeping records common to all agencies." Pet. App. at 39a. Moreover, before promulgating GRS 20 and even during this litigation, the National Archives issued statements declaring that general record schedules should be "limited to common administrative records," 63 Fed. Reg. 54,503, 54,504/3 (Oct. 9, 1998); *see also* Pet. at 8, 10; Pet. App. 38a-39a (quoting additional statements limiting general schedules to administrative records).

Respondents assert that the Archivist addressed the apparent inconsistency between his past statements and GRS 20's application to all records "in the notice announcing GRS 20." Opp. at 19 & n.7. The passage Respondents quote, however, does not address departure from past practice. Moreover, the court of appeals did not rely on this passage to

justify the exceptional scope of GRS 20, but devised its own explanation for the departure, based on its own view of 44 U.S.C. § 3303(1) and the Archivist's statements. *See* Pet. App. at 9a-10a. This explanation does not appear in any of the Archivist's statements, and is inconsistent with his 1998 statement that GRS 20 needs changing because general schedules "should be applied to the disposition of routine administrative 'housekeeping' records, not programmatic records." John W. Carlin, *Moving Ahead on Electronic Records Challenges*, THE RECORD, Vol. 4, No. 3, at 4 (Jan. 1998).

Thus, even if the court of appeals' explanation for the departure from past practice is reasonable (which we dispute), it is not the Archivist's view, but a position developed by counsel to defend the Archivist's action in litigation. Affording controlling deference to such *post hoc* explanations is inconsistent with *Chenery*, and with the decisions of other circuit courts cited in the Petition. Pet. at 21-22.

2. Respondents also assert that the court of appeals' construction of the statutory phrase "after the lapse of specified periods of time," in 44 U.S.C. § 3303a(d), was articulated by the Archivist in promulgating GRS 20. Opp. at 21. Respondents, however, are not able to cite any statement by the Archivist that articulates the construction to which the court of appeals deferred. More importantly, Respondents' claim is inconsistent with the Archivist's notices in 1998 declaring that he "has determined that indefinite retention periods," such as "destroy when no longer needed," are "inappropriate under the GRS." 63 Fed. Reg. 41,869 (Aug. 5, 1998).

Thus, the Archivist's statements show that he failed to address the construction of this phrase when he promulgated GRS 20 in 1995 (although the issue was raised in the

comments), and when the Archivist did address the issue in 1998, he adopted a position that is incompatible with the litigation position to which the court of appeals deferred.

3. Finally, Respondents do not dispute that appellate counsel was the first to contend that GRS 20 requires that paper or microform copies must reproduce all of the information contained in the electronic format. Nor do Respondents dispute that, even during the district court litigation, the government conceded that GRS 20 did not require preservation of all electronic information. *See* Pet. App. 45a-46a (concluding that GRS 20 specifically requires dates of transmission and receipt, and names of recipients of electronic mail to be preserved, but does not require preservation of information unique to electronic format). Instead, Respondents argue that the court of appeals' decision to accept appellate counsel's new construction of the rule was not improper because it imposes a requirement "that petitioners feared might be lacking." Pet. App. at 22a.

However, by deferring to a new construction of GRS 20 developed *after* the administrative proceedings, the court of appeals upheld a rule that is materially different from the rule that the Archivist adopted. The Archivist's statement adopting GRS 20 makes clear that he did not interpret its language to require printing of all information forming part of the electronic record. Indeed, the Archivist narrowed the provisions concerning spreadsheets because, under his reading of GRS 20, information that does not appear on a paper print-out would *not* be preserved. *See* Pet. App. at 68a. Thus, appellate counsel's contention that GRS 20 requires that print-outs contain *all* electronic information (not just the information listed by the Archivist, *see* Pet. App. at 71a, Note), imposes new and potentially burdensome requirements that the Archivist never

considered. There is no way to determine whether the Archivist would have adopted GRS 20, or narrowed its provisions, if he had been aware of how it would be expanded by appellate counsel and the court of appeals.

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Respondents are certainly correct in observing that "[a]n agency is entitled to consider varying interpretations and the wisdom of its policy on a continuing basis." Opp. at 24. However, this Court's cases also hold that an agency may not continue to change its interpretations and policy during the course of litigation challenging the agency's decision, and then claim that its litigation position is entitled to deference as the position of the agency. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983). The decision below demonstrates that the District of Columbia Circuit now extends controlling deference to interpretations of regulations and statutes developed by litigation counsel rather than by the agency itself. That practice should be reviewed by this Court.

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to review the District of Columbia Circuit Court's holding that GRS 20 is consistent with the Records Disposal Act.

Respectfully submitted,

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